No. 18-

IN THE

Supreme Court of the United States

MAURICE WALKER,
on behalf of himself and others similarly situated,
Petitioner,

v.

CITY OF CALHOUN, GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether heightened scrutiny under the Fourteenth Amendment applies to a government policy that keeps misdemeanor and traffic-offense arrestees in jail pretrial solely because they are poor.

2. Whether the government can keep misdemeanor and traffic-offense arrestees in jail for up to 48 hours after arrest solely because they are poor when it has offered no reason for doing so.

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Maurice Walker respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's most recent opinion in this case (App. 1a-64a) is published at 901 F.3d 1245. Its prior opinion in the case is available at 682 F. App'x 721. The district court's second opinion entering a preliminary injunction in this case (App. 65a-78a) is unpublished but available at 2017 WL 2794064. Its first

opinion entering a preliminary injunction is unpublished but available at 2016 WL 361612.

JURISDICTION

The Eleventh Circuit's judgment was entered on August 22, 2018. App. 1a. On November 13, Justice Thomas extended the time for filing this petition through December 20. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Respondent's "Standing Bail Order" appears in the appendix (pages 79a-86a).

INTRODUCTION

This Court has long held that under the Equal Protection and Due Process Clauses, individuals may not be "subjected to imprisonment solely because of [their] indigency." *Tate* v. *Short*, 401 U.S. 395, 398 (1971); *accord Bearden* v. *Georgia*, 461 U.S. 660, 672-673 (1983); *Williams* v. *Illinois*, 399 U.S. 235, 240-241 (1970). This right against wealth-based incarceration is infringed by respondent Calhoun, Georgia's policy on the setting of money bail for people arrested for traffic or misdemeanor offenses. Under that policy, arrestees with money can buy near-immediate release, while their

poor counterparts are jailed for up to 48 hours, solely because they are poor.

A divided panel of the Eleventh Circuit held that this policy did not trigger heightened scrutiny, and it upheld the policy even though Calhoun never offered any justification for it, i.e., any reason why the City needs to keep poor arrestees (and only poor ones) in jail for 48 hours before releasing them. Those holdings are wrong under this Court's case law, and they conflict with precedent of the Fifth Circuit, which has repeatedly held that infringements of the right against wealth-based incarceration trigger heightened scrutiny. *See ODonnell* v. *Harris County*, 892 F.3d 147, 159 (5th Cir. 2018) (opinion on rehearing); *Frazier* v. *Jordan*, 457 F.2d 726, 728 (5th Cir. 1972).

This conflict merits review because the panel's weakening of the right against wealth-based incarceration will have grave real-world implications for an enormous number of people. Millions of people are put in jail in the United States each year, with upwards of three-quarters of a million people in jails throughout the country on an average day. *See* Zeng, Bureau of Justice Statistics, *Jail Inmates in 2016*, at 1 (Feb. 2018), *at* https:// www.bjs.gov/content/pub/pdf/ji16.pdf. And as this Court recently reiterated, "'[a]ny amount of actual jail time'" imposes "'exceptionally severe consequences for the incarcerated individual.'" *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1907 (2018) (quoting *Glover* v. *United States*, 531 U.S. 198, 203 (2001)). Those consequences—as this Court recognized in *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975), and as the dissent and several amici detailed below—include loss of jobs and housing as well as disruption of family connections, such as inability to care for young children or elderly parents. These harms, in turn, often lead to in-

creases in crime, thereby spreading the burden beyond arrestees and their families to the general public. *See Rosales-Mireles*, 138 S. Ct. at 1907 (the imposition of jail time burdens "society[,] which bears the direct and indirect costs of incarceration"); *infra* pp.26-29. The Eleventh Circuit approved the infliction of those harms based on deeply flawed reasoning, and despite any proffered justification for Calhoun's policy. Its decision should not stand.

STATEMENT

A. Factual Background

In September 2015, petitioner Maurice Walker was arrested in Calhoun, Georgia, and charged with being a pedestrian under the influence of alcohol. App. 2a. Although that offense carries no jail time, *see* Ga. Code Ann. §40-6-95, Walker was incarcerated and "told by an officer that 'he would not be released unless he paid the standard $160 cash bond,'" App. 2a.

The $160 amount came from the bail schedule (i.e., a chart) that Calhoun used at the time to determine whether misdemeanor and traffic-offense arrestees would be released prior to trial. App. 3a. For every offense, the amount of secured bail required under the schedule was exactly "the fine an arrestee could expect to pay if found guilty, plus applicable fees." *Id.*[1]

Walker could not afford $160: He has a mental illness that prevents him from working, he owns no property, and his only income is a $530 monthly disability check. App. 2a; Dist. Ct. Dkt. 4-1, at ¶4. Under Cal-

[1] "Secured" bail means that the money must be paid before release. "Unsecured" bail, by contrast, must be paid only if a required court appearance is missed.

houn's policy, those who could not pay the preset cash amount remained in jail until the next court session, while those able to pay were released almost immediately. App. 3a. Court sessions were held only on non-holiday Mondays, so those arrested during a week leading up to a Monday holiday (like Walker) could spend up to 13 days in jail because of their indigence. *Id.*

B. Initial District Court Proceedings

1. Five days after his arrest, Walker (while still incarcerated) filed this action. On behalf of himself and a putative class, he asserted that Calhoun's bail policy violated the Due Process and Equal Protection Clauses by "jailing the poor because they cannot pay a small amount of money." App. 3a. Of particular relevance here, Walker alleged that the policy infringed the constitutional right against wealth-based incarceration, App. 17a, a right this Court has grounded in both equal-protection and due-process principles, *see Bearden*, 461 U.S. at 664-673; *Tate*, 401 U.S. at 397-401; *Williams*, 399 U.S. at 239-245.[2]

The day after Walker sued, he was released from jail on a personal-recognizance bond, "by agreement with the City's counsel." App. 3a.

2. Approximately two months later, Calhoun (in opposing Walker's motion for a preliminary injunction) disclosed a new "Standing Bail Order." App. 3a, 79a-86a. Like the policy in effect when Walker was arrested, the SBO conditions pretrial freedom for misdemeanor and traffic-offense arrestees on an upfront

[2] Walker also alleged that the policy violated his due-process right to pretrial liberty. *See* App. 24a. That right is not at issue in this petition.

payment of a preset amount, an amount intentionally equal in all cases to the fine and surcharge imposed upon conviction. *See* App. 82a ("[T]he amount necessary for secured bail … represents the expected fine with applicable surcharges … should the accused later enter a plea, or be found guilty following a bench trial."), *quoted in* App. 3a.

Unlike the prior policy, however, the SBO caps pretrial incarceration of poor misdemeanor and traffic-offense arrestees at 48 hours. It does this by providing (1) that within 48 hours of arrest, arrestees who have not been released receive a counseled hearing during which they can demonstrate indigence, and (2) that those who do show indigence are released on recognizance. App. 4a-5a, 84a-86a. It also provides that jailed arrestees who do not receive such a hearing are released on recognizance 48 hours after arrest. App. 5a.

3. The district court granted Walker's motion for a preliminary injunction. *Walker* v. *City of Calhoun*, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016).

In addressing likelihood of success on the merits, the court relied on the *Williams-Tate-Bearden* line of cases to hold that wealth-based incarceration of pretrial arrestees is impermissible absent an adequate justification. *See Walker*, 2016 WL 361612, at *6. Applying that holding, the court ruled that "[t]he bail policy under which [Walker] was arrested clearly is unconstitutional." *Id.* at *11. The court also concluded that Calhoun's revised policy, although "shorten[ing] the amount of time that indigent arrestees are held in jail to forty-eight hours," suffered from the same constitutional infirmity. *Id.* The court accordingly ordered Calhoun "to implement post-arrest procedures that comply with the Constitution" and, until then, to

promptly "release … misdemeanor arrestees" without requiring any upfront cash payment. *Id.* at *14.

C. First Appeal And Remand

Without addressing the merits, the Eleventh Circuit vacated the preliminary injunction and remanded, holding that the injunction was not specific enough to satisfy Federal Rule of Civil Procedure 65(d). App. 5a-6a.

On remand, the district court solicited briefing on how to proceed. App. 68a-69a. One dispute that the briefing crystallized was the applicable standard of scrutiny. In Calhoun's view, rational-basis scrutiny applied because "indigence does not make [an] individual a member of a suspect class." App. 71a n.2. Walker, by contrast, had previously contended that heightened scrutiny applied under the *Williams-Tate-Bearden* line of cases (and that Calhoun—having offered no justification for incarcerating indigents for 48 hours after arrest—had not carried its burden). *See, e.g.*, Dist. Ct. Dkt. 34, at 9-11.

Again invoking *Williams*, *Tate*, and *Bearden*, the district court agreed with Walker, both as to the standard of scrutiny and as to Calhoun's failure to satisfy it. App. 70a-71a & n.2. The court therefore issued a revised preliminary injunction requiring Calhoun to determine arrestees' ability to pay bail within 24 hours of arrest, and to immediately release those who established indigence, either with no conditions or on unsecured bail, i.e., a promise to pay if they missed a required court appearance. App. 75a-78a.

D. Decision Below

1. A divided panel of the Eleventh Circuit vacated the revised preliminary injunction and remanded. App. 45a.

The panel first (unanimously) rejected three threshold arguments that Calhoun had raised: that *Younger* v. *Harris*, 401 U.S. 37 (1971), required abstention; that Calhoun could not be liable under 42 U.S.C. §1983, as interpreted in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978); and that Walker's claim had to be brought under the Eighth Amendment rather than the Fourteenth. App. 7a-13a, 15a-19a; *see also* App. 46a n.1 (dissent agreeing with these holdings).

The majority then held that the district court was "wrong to apply heightened scrutiny," App. 24a, rejecting Walker's contention that infringement of the right against wealth-based incarceration triggers such scrutiny.[3]

The panel acknowledged that "wealth-based distinctions [can be] impermissible." App. 21a. But under *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), the panel stated, such distinctions are impermissible only if they impose an "'absolute deprivation' of [a] benefit," App. 23a; "mere diminishment of some benefit" is insufficient, App. 22a. And 48 hours of incarceration, the panel asserted, is not an "absolute deprivation" of liberty. App. 23a. Rather, in the panel's view Calhoun's policy provides that indigents "must merely wait some appropriate amount of time to

[3] The panel also rejected Walker's separate argument that infringements of the right to pretrial liberty trigger heightened scrutiny. App. 24a-26a. Again, that right (and hence that holding) are outside the scope of this petition.

receive the same benefit as the more affluent," "namely pretrial release." *Id.* If that was enough to trigger heightened scrutiny, the panel contended—equating the right to physical liberty with a (non-existent) right to have mail delivered quickly—then the Postal Service would incur heightened scrutiny for imposing a fee to use "express service." App. 23a-24a; *accord* App. 27a.

In a footnote, the panel acknowledged that the Fifth Circuit in *ODonnell* "applied heightened scrutiny under the Equal Protection Clause" to a bail policy that effected wealth-based incarceration on misdemeanor arrestees. App. 33a n.12. The panel deemed *ODonnell* distinguishable, however, largely based on the "extensive factual findings" made in that case. *Id.*

Having rejected heightened scrutiny, the panel held the SBO constitutional. App. 32a-34a. Its rationale was that this Court, in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), held that probable-cause hearings are presumed valid under the Fourth Amendment if conducted within 48 hours of arrest, *id.* at 56. Although the jurisdiction in *McLaughlin* did not give probable-cause hearings to wealthy arrestees sooner than indigent ones (whereas Calhoun, as explained, does release moneyed arrestees sooner than poor ones), the panel imported *McLaughlin*'s Fourth-Amendment ruling into the Fourteenth-Amendment context, holding that "indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest," App. 33a.

At the end of its opinion, the panel unanimously ruled that even though it had upheld the SBO, Walker's injunctive-relief claim was not moot because Calhoun could revert to the policy that was in place when he was arrested. App. 38a-43a; *see also* App. 46a n.1 (dissent

agreeing with this holding). But, the majority concluded, while the superseded policy could be enjoined, that did not provide a basis for the district court to enjoin the SBO. App. 43a-44a.

2. Judge Martin dissented in relevant part. She would have held that Calhoun's policy of wealth-based incarceration triggered heightened scrutiny under the *Williams-Tate-Bearden* line of cases, and that Calhoun had not satisfied its burden under such scrutiny. App. 46a-47a, 57a, 64a.

In several cases, Judge Martin expounded, this Court has "recognized that wealth-based detention is not permitted by our Constitution." App. 47a. Those cases, she said—including *Rodriguez*—"support the … application of heightened scrutiny under the Equal Protection Clause to the City's bail policy." *Id.* That was because, "[u]nder the Standing Bail Order," if "two people, one who has money and the other who does not … are arrested for the same crime … under the same circumstances," "[t]he person who has money pays it and walks away," while the "indigent can't pay, so he goes to jail. This is plainly imprisonment solely because of indigent status," triggering heightened scrutiny. App. 48a (quotation marks omitted).

The panel's contrary conclusion, Judge Martin stated, rested on "word play." App. 49a. Specifically, the court simply "rename[d] the interest" at issue, changing it from "freedom from [wealth-based] incarceration" to immediate "access to pretrial release." *Id.* This change, Judge Martin said, allowed the panel to treat "48 hours in jail as a mere delay or 'diminishment' of the benefit of being released, instead of the deprivation of liberty it surely is." App. 49a-50a. That approach, she continued, ignored the "very real conse-

quences" of any incarceration, including loss of jobs or homes and disruption of family connections. App. 52a. Given those severe consequences, she reasoned, it was "unremarkable to say that being jailed for 48 hours is more than a mere inconvenience," *id.*, and likewise unremarkable to say that "an incarcerated person suffers a complete deprivation of liberty within the meaning of *Rodriguez*, whether the[] jail time lasts two days or two years," App. 50a. This last point was reinforced, in her view, by the fact that none of this Court's relevant cases "qualified how long the confinement had to last before it became a deprivation of liberty." *Id.*

By refusing to apply heightened scrutiny, Judge Martin wrote, the panel departed from *ODonnell*, in which "the Fifth Circuit looked to *Rodriguez* in holding that 'indigent misdemeanor arrestees [who] are unable to pay secured bail … sustain an absolute deprivation of their most basic liberty interest[]—freedom from incarceration.' " App. 51a (quoting *ODonnell*, 892 F.3d at 162). The panel's claim that *ODonnell* was "factually distinct" failed, she explained, because "the only difference between [the] system" at issue there "and Calhoun's system[] is that the [former] allowed indigents to be detained for longer than 48 hours." App. 51a, 52a. In her view, that difference was not "meaningful" under relevant precedent. App. 52a.

Applying heightened scrutiny, Judge Martin concluded that Calhoun had not carried its burden because it "gave no justification for its policy of detaining indigents for 48 hours." App. 63a. She rejected Calhoun's lone defense: that its policy was valid in light of *McLaughlin*. App. 59a-61a. If that defense had merit, she stated, then Calhoun could adopt "a bail policy that releases all arrestees after booking, except for female, black, or Catholic arrestees," who were "detained for 48

hours, given a hearing, and then released." App. 60a-61a. That, Judge Martin reasoned, would "plainly" be unconstitutional, notwithstanding *McLaughlin*'s Fourth Amendment holding. App. 61a. The same, she wrote, was true here. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S HOLDING THAT HEIGHTENED SCRUTINY DOES NOT APPLY TO CALHOUN'S BAIL POLICY WARRANTS REVIEW

Calhoun's bail policy keeps poor misdemeanor and traffic-offense arrestees in jail pretrial longer than non-indigent ones. The Eleventh Circuit held that this infringement of the right against wealth-based incarceration does not trigger heightened scrutiny. That holding is wrong under this Court's precedent, and it conflicts with decisions from the Fifth Circuit.

A. The Decision Below Conflicts With Fifth Circuit Precedent

1. The Fifth Circuit has repeatedly held that violations of the right against wealth-based incarceration incur heightened scrutiny.

ODonnell, for example, involved a challenge to a Texas county's bail policy that (as here) kept pretrial misdemeanor arrestees in jail only because they were poor. *See* 892 F.3d at 152-153, 162. Citing *Williams* and *Tate*, the Fifth Circuit (speaking through Judge Clement) recognized that this Court "has found that heightened scrutiny is required when criminal laws detain poor defendants *because of* their indigence." *Id.* at 161. *ODonnell* further recognized that in *Rodriguez*, this Court—citing *Williams* and *Tate*—had reaffirmed that heightened scrutiny applied in such situations. *Id.*

The Fifth Circuit concluded that *ODonnell* presented the "same basic injustice" as those cases, namely that "poor arrestees … are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay." *Id.* at 162. The court therefore held that "[h]eightened scrutiny of the County's policy [was] appropriate." *Id.* That holding cannot be reconciled with the panel's ruling here that Calhoun's "scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence." App. 23a; *see* App. 51a-52a (dissent).

These conflicting holdings, moreover, flowed from the diametrically opposed ways that the two circuits read this Court's decision in *Rodriguez*. *ODonnell* concluded that *Rodriguez supported* heightened scrutiny because indigent arrestees in Harris County "sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration." 892 F.3d at 162. The Eleventh Circuit, in contrast, concluded that *Rodriguez foreclosed* heightened scrutiny because under Calhoun's bail policy, indigent arrestees do not suffer any "absolute deprivation" but instead (the panel asserted) "must merely wait some appropriate amount of time to receive the same benefit as the more affluent." App. 23a.

2. The panel here conceded in a footnote that "the *ODonnell* court applied heightened scrutiny under the Equal Protection Clause." App. 33a n.12. But it denied any conflict by claiming that *ODonnell* was "quite factually distinct." App. 23a n.10. In particular, the panel noted that *ODonnell* involved "extensive factual findings from the district court, resulting from a lengthy evidentiary hearing, that Harris County did not provide arrestees *any* opportunity to submit evidence of relative ability to post bond," whereas "the Standing

Bail Order guarantees release to indigents within 48 hours." App. 33a n.12 (quotation marks omitted).

That distinction lacks merit. It is true that a factual difference (in fact the only one) between Calhoun's policy and Harris County's is that the latter allowed indigents to be detained for longer than 48 hours. App. 52a (dissent). But the length of incarceration played no part in *ODonnell*'s holding that heightened scrutiny applied. Indeed, *ODonnell's* lengthy equal-protection analysis never even mentioned how long indigents were jailed under Harris County's policy, let alone suggested that that mattered. *See* 892 F.3d at 161-163.

The panel here also stated in passing that the evidence in *ODonnell* "permitted the Fifth Circuit to conclude that [Harris] County acted with a discriminatory purpose." App. 33a n.12 (quotations marks omitted). The panel never explained why that would matter even if it were true, and it would not matter. Whether a policy involves discriminatory purpose, disparate impact, or both has no effect on the nature of the resulting deprivation (here, the loss of liberty), and hence does not affect whether that deprivation is "absolute" under *Rodriguez*, triggering heightened scrutiny.

3. Even if the panel's distinction of *ODonnell* had merit, its holding would still conflict with Fifth Circuit precedent. In *Frazier* v. *Jordan*, that court (speaking through Judge Wisdom), applied strict scrutiny to the imposition of wealth-based incarceration, holding that Atlanta's imprisonment of those who were convicted of ordinance violations and could not pay a $17 fine would be constitutional only if it was "necessary to promote a compelling governmental interest." 457 F.2d at 728; *accord id.* ("Since the difference in treatment is one defined by wealth, the alternative fine … must be tested

by the compelling state interest test."). Walker's brief below cited *Frazier*'s application of heightened scrutiny (pp.18, 19), but the panel ignored it, citing *Frazier* only in an unrelated string cite, App. 18a n.8.

B. The Decision Below Is Wrong

1. The panel's refusal to apply heightened scrutiny to Calhoun's infringement of the right against incarceration based on wealth cannot be reconciled with this Court's precedent.

Williams, *Tate*, and *Bearden*, each of which invalidated a state law that imposed wealth-based incarceration, make clear that heightened scrutiny applies to any such law. In each case, this Court, though recognizing that legitimate government interests were involved, struck down the challenged law because there were other ways those interests could have been served. *Williams*, for example, held the law at issue unconstitutional—despite the "substantial and legitimate" government interest it implicated—in light of the "numerous alternatives to which the State … may resort in order to avoid imprisoning an indigent … for involuntary nonpayment of a fine or court costs." 399 U.S. at 238, 244. Similarly, *Tate* acknowledged a "valid interest in enforcing payment of fines," yet it overturned the challenged law because of the "alternatives to which the State may constitutionally resort" to serve that interest. 401 U.S. at 399. And likewise, *Bearden* rejected as insufficient multiple interests that Georgia cited, noting that they "can often be served fully by alternative means." 461 U.S. at 671-672.

These cases' invalidation of state laws based on the availability of alternatives leaves no doubt that heightened scrutiny rather than rational-basis review was

applied. Under rational-basis review, it is "irrelevant to the equal protection analysis … that other alternatives might achieve approximately the same result." *Vance* v. *Bradley*, 440 U.S. 93, 103 n.20 (1979). In applying rational-basis review, in other words, courts "'must disregard' the existence of alternative methods of furthering the objective." *Heller* v. *Doe*, 509 U.S. 312, 330 (1993) (quoting *Schweiker* v. *Wilson*, 450 U.S. 221, 235 (1981)). With heightened scrutiny, by contrast, alternatives are highly relevant—often dispositive. *See Wengler* v. *Druggists Mutual Insurance Company*, 446 U.S. 142, 151 (1980) (gender-based classification invalid where an adequate gender-neutral alternative was available); *Orr* v. *Orr*, 440 U.S. 268, 281 (1979) (Alabama could not use gender as a proxy for financial need in setting alimony given that under its alimony laws, "individualized hearings at which the parties' relative financial circumstances are considered *already* occur"); *cf. McCullen* v. *Coakley*, 134 S. Ct. 2518, 2539 (2014) (law failed intermediate First Amendment scrutiny because the government "has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate"). Hence, while the *Williams-Tate-Bearden* trilogy did not use all of the verbiage traditionally associated with heightened scrutiny, *but see Bearden*, 461 U.S. at 666 (stating that laws imposing wealth-based incarceration require "careful inquiry"), each case plainly employed such scrutiny.

Williams, *Tate*, and *Bearden*, of course, involved imprisonment of indigent convicts, rather than (as here) indigent arrestees. But the cases' reasoning and holdings apply *a fortiori* in the latter context. Pretrial arrestees, after all, unlike convicts, are "shielded by the presumption of innocence, the 'bedrock[,] axiomatic and

elementary principle whose enforcement lies at the foundation of … our criminal law.'" *Betterman* v. *Montana*, 136 S. Ct. 1609, 1614 (2016) (alteration in original) (quoting *Reed* v. *Ross*, 468 U.S. 1, 4 (1984)). As the en banc Fifth Circuit reasoned, therefore, this Court's holdings that the Constitution prohibits wealth-based incarceration of convicts has even "broader effects and constitutional implications" for those "accused but not convicted of crime." *Pugh* v. *Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc). That is particularly true here, given that Calhoun's bail schedule *always* sets the amount of bail at exactly "the fine an arrestee could expect to pay if found guilty, plus applicable fees." App. 3a. Calhoun is thus effectively imposing post-conviction fines—just as in *Williams*, *Tate*, and *Bearden*.

To be clear, Walker's arguments do not rest on the notion that indigence is a suspect classification. In fact, *Rodriguez* held that normally it is not. But in so holding, the Court expressly exempted the *Williams* line of cases from rational-basis review because they involved an "absolute deprivation" of a benefit—freedom from incarceration—to a "class … composed only of persons who were totally unable to pay." 411 U.S. at 20, 22. That carve-out is consistent with *Bearden*'s explanation that the right against wealth-based incarceration is not simply about equal protection but instead involves a "converge[nce]" of due-process and equal-protection principles. 461 U.S. at 665. Hence, wealth-based *incarceration*, unlike most wealth-based classifications, is subject to heightened scrutiny.

2. The decision below acknowledged that *Rodriguez*—"with a focus on *Bearden*'s antecedents"—held that certain "wealth-based distinctions [are] impermissible." App. 21a. But they are impermissible, the panel

stated, only where indigents suffer an "absolute deprivation" of a benefit. App. 22a, 23a. And Calhoun's policy of keeping poor arrestees in jail up to 48 hours, the panel asserted, effected no such deprivation, instead requiring that indigents "merely wait some appropriate amount of time to receive the same benefit as the more affluent." App. 23a.

This reasoning, for which the panel cited no authority, is simply "word play." App. 49a (dissent). In particular, the panel *sub silentio* changed the relevant "benefit" from "liberty"—which indigent arrestees in Calhoun indisputably suffer an "absolute deprivation" of—to immediate "pretrial release." But there is no basis for that change. None of this Court's cases suggests that the "impermissibility of imprisoning a defendant solely because of his lack of financial resources," *Bearden*, 461 U.S. at 661, evaporates unless the imprisonment is sufficiently long.

In fact, the cases strongly indicate the opposite. For example, *Williams* invalidated a law providing that convicts who were unable to pay a fine could be imprisoned beyond the statutory maximum to work off the fine amount at a rate of $5 per day. 399 U.S. at 238. The Court did not limit that invalidation to convicts who owed at least a certain amount (and thus would be imprisoned for a certain period). Instead, it stated categorically that states "may not … subject a certain class of convicted defendants to *a period of imprisonment* beyond the statutory maximum solely by reason of their indigency." *Id.* at 242 (emphasis added). *Tate*'s holding was similarly unqualified; this Court ruled that "petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination [as in *Williams*] since petitioner was subjected to imprisonment solely because of his indigency." 401 U.S. at

397-398. Not "imprisonment of more than 48 hours" (or any other duration). Just "imprisonment solely because of … indigency."

None of this Court's cases, moreover, framed the relevant "benefit" the way the panel did, i.e., as immediate pretrial release rather than liberty (let alone did so with 48 hours of incarceration labeled a mere waiting period rather than an "absolute deprivation," App. 23a). If that framing were valid, then *Williams*, *Tate*, and *Bearden* would have described the benefit in those cases as something like "release following completion of sentence," and would have similarly concluded that the challenged laws simply required that indigents "merely wait some appropriate amount of time to receive the same benefit as the more affluent." *Id.* That the Court did not do so further refutes the panel's conclusion that imposing two days in jail (without any articulated reason) involves no "absolute deprivation" and therefore does not incur heightened scrutiny. That conclusion is likewise inconsistent with this Court's recent observation that "'[a]ny amount of actual jail time'" imposes "exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles*, 138 S. Ct. at 1907; *see also infra* pp.26-29.[4]

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[4] The panel further claimed that indigent arrestees—despite being subject to two days in jail while their moneyed counterparts are freed immediately—"arguably receive preferential treatment … by being released on recognizance" after 48 hours. App. 23a. If the panel was implying that this constitutes impermissible discrimination against wealthy defendants, that is wrong. This Court has held, for example, that indigent criminal defendants normally receive a free trial lawyer, first-appeal lawyer, and trial transcript, whereas defendants with resources do not. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). In fact, those

3. The panel additionally justified its refusal to apply heightened scrutiny by claiming that in *Rainwater*, the en banc former Fifth Circuit approved the use of a bail schedule "without applying [such] scrutiny." App. 20a. That is incorrect.

What *Rainwater* approved was the use of bail schedules *for defendants who can pay*. And that was correct; there is nothing inherently unconstitutional about such use of standardized financial conditions of release, just as there is nothing inherently unconstitutional about requiring criminal defendants *who can afford it* to pay for trial transcripts on appeal. But that does not mean the government is free to use bail schedules to effect wealth-based incarceration, any more than it is free to make indigent appellants pay for trial transcripts (thereby effectively denying such transcripts). *See Griffin*, 351 U.S. at 19 (plurality opinion); *id.* at 23-24 (Frankfurter, J., concurring in the judgment).

Rainwater recognized this, i.e., the impermissibility of using bail schedules to effect wealth-based incarceration. That is why—contrary to the panel's claim—it did apply heightened scrutiny: Indeed, it expressed "no doubt" that if the government's interest in "appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would" be unconstitutional. 572 F.2d at 1058. The court held, in other words, that the government may impose wealth-based incarceration (whether by applying a secured-bail schedule to

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entitlements are significantly more valuable than not having to pay bail, because bail, unlike attorney's fees and transcript fees, is refunded to defendants who show up for trial. The panel's suggestion of "reverse-discrimination" is utterly insubstantial.

indigents or otherwise) only if it shows that doing so "is necessary to reasonably assure defendant's presence at trial." *Id.* at 1057. And from this it followed that the "incarceration of those who cannot [pay], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* All that is heightened scrutiny.

These same points answer the panel's reliance on *Rainwater*'s statement that the use of a bail schedule "provides speedy and convenient release for those who have no difficulty in meeting[] its requirements," 572 F.2d at 1057. According to the panel, "if the bond schedule provided 'speedy' release to those who could meet its requirements, it necessarily provided less speedy release to those who could not. Nevertheless, the *Rainwater* court upheld the scheme." App. 20a-21a. But again, *Rainwater* upheld the use of the bail schedule only as to "those who have no difficulty in meeting[] its requirements," i.e., those to whom it provided "speedy and convenient release." 572 F.2d at 1057. In the very next sentence, in fact, *Rainwater* made clear that using a bail schedule to effect detention of indigents "infringes on both due process and equal protection." *Id.* As Judge Martin wrote here, the panel "emphasizes the ['speedy and convenient'] sentence but is blind to what the [next] sentence plainly says." App. 50a n.4.

Far from justifying the panel's departure from this Court's precedent, then, *Rainwater* underscores the panel's error.[5]

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[5] To be clear, the foregoing discussion is provided because of *Rainwater*'s importance to the panel's analysis, not to suggest that the panel's misapplication of *Rainwater*—a case that bound the

II. THE ELEVENTH CIRCUIT'S HOLDING THAT CALHOUN'S BAIL POLICY IS CONSTITUTIONAL WARRANTS REVIEW

The panel here upheld Calhoun's bail policy even though the City—throughout the district court proceedings and in its briefing on appeal—presented no justification for keeping indigent arrestees in jail for up to 48 hours, instead insisting under *McLaughlin* that it was entitled to do so without providing any justification. App. 59a (dissent). The court thus sustained Calhoun's infringement of the constitutional right against wealth-based incarceration without requiring the City to offer *any* explanation for why doing so was necessary (or even beneficial). That blessing of wholly gratuitous violations of an important constitutional protection warrants this Court's review.[6]

A. Under heightened scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). When defending pretrial-release policies, the government typically seeks to carry that demanding

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panel under *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)—is itself a basis for certiorari.

[6] At oral argument before the Eleventh Circuit, Calhoun (after repeated questions on the point) finally offered a justification for its 48-hour-imprisonment policy, namely "'to get the players to the game'—meaning to get the City's only municipal judge to the municipal court so she can hold a hearing." App. 61a n.10 (dissent). The panel nowhere mentioned this justification, much less relied on it, and rightly so. Whether or not the rationale would have sufficed if raised timely (and Calhoun notably provided no supporting evidence even when finally raising it), Calhoun abandoned it by raising it so late. *Id.*; *see also, e.g.*, *Smith* v. *Secretary, Department of Corrections*, 572 F.3d 1327, 1338 n.6 (11th Cir. 2009) ("an argument raised for the first time during oral argument comes too late")

burden by invoking its interests in protecting public safety and ensuring arrestees' appearance at trial. *E.g.*, *ODonnell*, 892 F.3d at 162. Calhoun, however, cannot rely on either interest to justify its wealth-based incarceration here. That is because under the SBO, *all* indigent misdemeanor and traffic-offense arrestees are released—without any money bail or other conditions—as soon as they show indigence (and without even doing that if no hearing is held within 48 hours of arrest). The SBO thus reflects Calhoun's judgment that indigent arrestees charged with committing misdemeanors in the City present no flight risk or public danger.[7]

Calhoun appears to have recognized that it cannot rely on these interests, because as noted it never invoked them, instead arguing only that under *McLaughlin*, its post-arrest wealth-based incarceration of up to 48 hours was "immun[e]" from constitutional challenge. Resp. C.A. Br. 42. *McLaughlin*, however, was a Fourth Amendment case. And as this Court has repeatedly explained, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal* v. *Cook County*, 506 U.S. 56, 70 (1992); *accord United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."); *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018) (probable cause does not preclude a First Amendment claim for retaliatory

[7] This is confirmed by the fact that under the SBO, arrestees charged with violating Calhoun's municipal code rather than state law are released immediately, with just a promise to pay if they miss a court appearance. App. 5a.

arrest). Hence, the fact that a 48-hour pretrial-incarceration policy complies with the Fourth Amendment does not mean it complies with other constitutional provisions. *See James Daniel Good*, 510 U.S. at 49.

The reason is that different constitutional provisions protect against different evils. For example, the Fourth Amendment serves as a shield against "unreasonable searches and seizures," safeguarding "[t]he right of the people to be secure in their persons, houses, papers, and effects." U.S. Const. amend. IV. The Equal Protection Clause, by contrast, bars "invidious discrimination." *E.g.*, *Rodriguez*, 411 U.S. at 17. Given the very different problems the two provisions address, there is no basis to assume that conduct valid under one must be consistent with the other.

This Court's precedent shows precisely that. In *Whren* v. *United States*, 517 U.S. 806 (1996), the Court concluded that although a police officer's subjective motivation would not invalidate—under the Fourth Amendment—an objectively reasonable traffic stop, the Equal Protection Clause would "prohibit[] selective enforcement of the law based on considerations such as race," *id.* at 813. The Eleventh Circuit's importation of *McLaughlin*'s Fourth Amendment holding into the Fourteenth-Amendment context here is starkly inconsistent with *Whren* and the other cases cited above.

B. The implications of the decision below underscore the panel's error. If Calhoun's policy is valid, then any jurisdiction could choose to release misdemeanor arrestees of one race, gender, or religion immediately after arrest, while imposing up to 48 hours of pretrial incarceration on those of another. App. 60a-61a (dissent). That cannot be right.

The panel disputed this implication on the ground that classifications based on race, gender, or religion receive heightened scrutiny. App. 20a, 23a-24a. But as explained, under this Court's precedent, heightened scrutiny likewise applies when indigents suffer an "absolute deprivation" (here, the loss of liberty) because of their indigence. *Rodriguez*, 411 U.S. at 20.

The same point rebuts the panel's claim that if heightened scrutiny applied here, it would apply as well to "[i]nnumerable government programs," including the imposition of fees for express mail service or tuition to attend public universities. App. 23a. None of the panel's examples—examples that improperly trivialize how serious the denial of physical liberty is, *see Rosales-Mireles*, 138 S. Ct. at 1907—involves a suspect classification or fundamental right.

The panel also claimed that its adoption of a 48-hour safe harbor was consistent with *ODonnell*. That is wrong. The Fifth Circuit in *ODonnell* did not wholesale "import[] the *McLaughlin* 48-hour rule." App. 33a. It instead relied on the record in that case—specifically "the district court's own finding … that 20% of detainees do not receive a probable cause hearing within 24 hours despite the [Texas] statutory requirement"—to conclude that the county there actually *needed* 48 hours, i.e., that it could satisfy heightened scrutiny. 892 F.3d at 160. As explained, Calhoun showed no such need.

In short, the panel cannot avoid the disturbing implications of its ruling that the government gets a free pass for 48 hours of discriminatory incarceration even when its own policies show that there is no public-safety or risk-of-flight justification for doing so. That

ruling—particularly given its inconsistency with *Whren* and similar cases—warrants this Court's review.

C. The foregoing arguments do not imply that a jurisdiction could never satisfy heightened scrutiny of a bail policy that infringed the right against wealth-based incarceration. Such policies unquestionably implicate important if not compelling governmental interests, such as ensuring defendants' appearance at trial. And a jurisdiction that could show (as in *ODonnell*) that it needed to detain all pretrial arrestees (or even just poor ones) for a particular amount of time in order to further such an interest could do so. The Eleventh Circuit erred in upholding Calhoun's policy, however, because the City made no such showing.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

The issues here are indisputably recurring, as many thousands of indigent people are arrested for misdemeanors each year. *See* Zeng, *supra*, at 1; Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713, 732-733, 787 (2017). And just as surely, the issues are enormously important, both for arrestees (whose freedom, livelihood, and other fundamental interests are at sake) and for the public generally—which is likely to see crime go *up* (along with costs, of course) as pretrial incarceration increases. The importance and recurring nature of the questions presented confirm the need for this Court's review.

Pretrial incarceration inflicts "very real consequences." App. 52a (dissent). Detainees "can lose their jobs. They can lose their homes and transportation. Their family connections can be disrupted. And all this

is to say nothing of the emotional and psychological toll a prison stay can have on an indigent person and her family members." *Id.* Scholars and others, including Walker's amici below, have explained this at length. For example, based on empirical evidence and legal scholarship, national pretrial-services organizations—representing services programs in every state and the federal system—explained below that "[m]ulti-day pretrial detention poses obvious threats to employment and family stability." National Association of Pretrial Services C.A. Amicus Br. 18 (Nov. 20, 2017); *see also*, *e.g.*, ABA C.A. Amicus Br. 7-9 (Nov. 20, 2017); Heaton et al., *supra*, at 781; Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1354-1356 (2014).

This Court has recognized these realities too, stating that "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein*, 403 U.S. at 114. Other federal and state courts around the country have acknowledged these points as well. *See*, *e.g.*, *ODonnell*, 892 F.3d at 162; *Brangan* v. *Commonwealth*, 80 N.E.3d 949, 966 n.23 (Mass. 2017); *Curry* v. *Yachera*, 835 F.3d 373, 376 (3d Cir. 2016); *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc).

Importantly, although *Gerstein* referred to "prolonged detention," the harmful consequences of incarceration "can be just as dire for a two-day jail stay," App. 53a (dissent); *accord* C.A. ABA Amicus Br. 7-8. An arrestee "detained for even a few days may lose her job, housing, or custody of her children." Heaton et al., *supra*, at 713. And even if custody is not actually lost, brief periods of incarceration mean "[c]hildren may be

left unsupervised, and elderly or sick relatives may have no one else to take care of them." C.A. ABA Amicus Br. 8.

These destabilizing effects often lead to additional harms. Specifically, those detained for just "two to three days [a]re 39 percent more likely to engage in criminal activity while awaiting trial." C.A. National Association of Pretrial Services Amicus Br. 20. Similarly, "[e]ven brief periods of pretrial incarceration … negatively impact rates of reappearance." *Id.* at 19. In other words, as the Fifth Circuit emphasized in describing relevant studies, pretrial incarceration, far from advancing public safety, "*increase[s]* the likelihood of unlawful behavior," to the detriment not only of the arrestees but also of the general public. *ODonnell*, 892 F.3d at 162.

Chief Judge Rosenthal made extensive findings on these points in *ODonnell*—findings the Fifth Circuit affirmed—after amassing a voluminous record and holding an eight-day evidentiary hearing. *See ODonnell* v. *Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017) (subsequent history omitted). "Recent studies," she noted, "conclude[] that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes or fail to appear at future court hearings." *Id.* at 1121, *aff'd in relevant part*, 892 F.3d at 159. More specifically, she cited a study—also cited by the Fifth Circuit on appeal—finding that if, from 2008 to 2013, "Harris County had given early release on unsecured personal bonds to the lowest-risk misdemeanor defendants … those released would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors in the eighteen months following pretrial release; and the County would have saved $20

million in supervision costs alone." *Id.* at 1122; *accord ODonnell*, 892 F.3d at 162.

The harms inflicted by pretrial incarceration are in fact so severe they often lead arrestees to waive valid defenses and plead guilty. C.A. ABA Amicus Br. 10, 13. That is why one recent study, analyzing detailed data on hundreds of thousands of misdemeanor cases in Harris County, Texas, found that detained arrestees were 25% more likely to plead guilty than similarly situated arrestees who were released. *See* Heaton et al., *supra*, at 711, 771, *cited in ODonnell*, 892 F.3d at 162. The pressure to plead guilty in order to get out of jail is especially pronounced with arrestees (like Walker) whose charged offense carries no jail time, meaning that a guilty plea—though carrying significant deleterious consequences in the long run—ensures immediate release.[8]

In sum, the decision below will inflict serious and far-reaching harm for many thousands of arrestees, as well as the public more generally. Review of the Eleventh Circuit's departures from decisions of this Court and the Fifth Circuit is therefore warranted.

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[8] Arrestees who resist the pressure to plead, and remain in jail pretrial, are more likely to be convicted than similarly situated arrestees who are released. Heaton et al., *supra*, at 726-728. This Court has explained why: "[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker* v. *Wingo*, 407 U.S. 514, 533 (1972); *see also id.* at 533 n.35.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES